EMPLOYMENT TRIBUNALS

Claimant: **Miss D Howden**

Respondent: **DN Colleges Group**

Heard in Sheffield **On: 8 April 2022**

Before: **Employment Judge Brain**

Representation

Claimant: **Written representations**
Respondent: **Written representations**

JUDGMENT UPON RECONSIDERATION

The Judgment of the Employment Tribunal is that there is no reasonable prospect of the Judgment dated 22 March 2022 being varied or revoked. Accordingly, the claimant's application for reconsideration fails and stands dismissed.

REASONS

1. There was a public preliminary hearing held in this matter on 22 March 2022. The purpose of the public preliminary hearing was to decide whether the claimant's claim should be struck out pursuant to the provisions of Rule 37 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The Tribunal ruled that the claimant's claim should be struck out. Judgment was given to that effect on 22 March 2022. The record of the Judgment was promulgated on 29 March 2022. I shall now refer to this as *"the Judgment".*
2. On 31 March 2022 the Tribunal received an application from the claimant for reconsideration of the Judgment.
3. Rule 70 of schedule 1 to the 2013 Regulations provides that an Employment Tribunal has the power to reconsider any judgment where it is necessary in the interests of justice to do so. This power can be exercised either on the Tribunal's own initiative or on the application of a party. Rules 71 to 73 set out the procedure by which this power is to be exercised.

4. Rule 70 provides for a single ground for reconsideration. That ground is where it is necessary to do so in the interests of justice.

5. This does not mean that in every case where a litigant is unsuccessful, they are automatically entitled to reconsideration. Instead, a Tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases fairly and justly and the Tribunal should be guided by the common law principles of natural justice and fairness. Tribunals have a broad discretion but that must be exercised judicially which means having regard not only to the interests of the party seeking the reconsideration but also the interests of the other party to the litigation.

6. An application for reconsideration must be presented in writing and copied to all other parties within 14 days of the date upon which the written record of the decision the subject of the reconsideration application was sent to the parties. In this case, the Judgment was promulgated on 29 March 2022. The application for reconsideration is in time. The application was copied to the respondent. Written representations upon it have been received from Mr Lancaster (who attended the hearing on behalf of the respondent on 22 March 2022). It follows therefore that the Tribunal has jurisdiction to consider the reconsideration application made by the claimant.

7. Rule 72 of the 2013 Regulations sets out the procedure that an Employment Tribunal will follow upon receipt of an application for reconsideration. Firstly, the application shall be put before the Employment Judge who decided the case or who chaired the panel hearing the case as the case may be. In this case, I sat alone. Accordingly, the reconsideration application has been put before me in accordance with the procedure in Rule 72. If the Employment Judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application will be refused and the Tribunal will notify the parties accordingly.

8. If the application is not refused, the Tribunal will send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the parties' views on whether the application can be determined without a hearing. That notice may also set out the Judge's provisional views on the application although it does not have to. The matter may then proceed to a hearing unless the Employment Judge considers – having regard to any response to the application – that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing, the parties shall be given a reasonable opportunity to make further written representations. It is clear that the policy intention underlining Rule 72 is that reconsideration applications will be dealt with on the papers wherever possible, thereby saving time, expense and resources.

9. The Employment Appeal Tribunal has recently emphasised the importance of following the Rule 72 procedure in the correct order in **T W White & Sons Ltd v White** [UK EAT] 0022/2021. The EAT said that the procedure does not allow for the Employment Judge to decide that a hearing is necessary before he or she takes the decision under Rule 72(1) as to whether there is no reasonable prospect of the original decision being varied or revoked. This aspect of the procedure provides an important protection to the party opposing the application, in that the other party should not be put to the time and expense involved in responding to the application if the Employment

Judge does not consider that there are reasonable prospects of the judgment being varied or revoked.

10. It is necessary to set out the procedural history of this matter. The claimant presented her claim form on 27 May 2021. The matter then came before Employment Judge Drake at a telephone case management preliminary hearing. This was held on 25 November 2021. The claimant was not in attendance.

11. Employment Judge Drake listed the matter for a further telephone case management preliminary hearing to be held on 9 March 2022. A number of Orders were made by him. By paragraph 5 of his Order, the claimant was required to furnish details of her disability. By paragraph 6, she was to serve an impact statement setting out the evidence to be given in support of her case that she was at the material time a disabled person for the purposes of section 6 of the Equality Act 2010. By paragraph 7, she was directed to serve medical evidence in support of that case. Employment Judge Drake's Order was emailed to the claimant on 6 December 2021.

12. On 7 February 2022, Employment Judge Lancaster converted the telephone case management preliminary hearing listed by Employment Judge Drake for 9 March 2022 into a video hearing. He also converted the hearing to a public or open preliminary hearing at which to consider the striking out of the claimant's case upon the following grounds:

    12.1. That the case has no reasonable prospect of success.

    12.2. That the claimant has failed to comply with Employment Judge Drake's Orders in paragraphs 5, 6 and 7.

    12.3. That the claimant was not actively pursuing the case.

13. When giving his directions for the conversion of the telephone case management preliminary hearing to an open preliminary hearing, Employment Judge Lancaster directed the claimant to comply with paragraphs 5, 6 and 7 immediately.

14. On 4 March 2022, the video hearing was converted to an in person hearing to be heard on 22 March 2022. The listing for 9 March 2022 was vacated.

15. On 17 March 2022, the claimant applied for an adjournment of the hearing and said that it was her intention to take the matter to the Crown Court. She wrote in like terms on 11 and 14 March 2022.

16. On 17 March 2022 a letter was sent to the parties by the Employment Tribunal confirming that the hearing remained listed for 22 March 2022.

17. The claimant did not attend on 22 March 2022. Mr Lancaster appeared on behalf of the respondent. Before hearing from Mr Lancaster, I directed the Tribunal clerk to make enquiries of the claimant. The Tribunal clerk spoke to the claimant at around 10.15 that morning. The message which I received was that the claimant told the clerk that she had emailed the Tribunal the previous week to the effect that the case was better dealt with in the Crown Court and that she would not be attending.

18. The letter from the Tribunal dated 17 March 2022 confirming that the case remained listed was emailed to the parties at 10.45am that day. This was acknowledged by the claimant on 18 March 2022 at 11.06. She said that the

Employment Tribunal was *"not at the level to deal with this case."* No further direction was given by the Tribunal. Accordingly, there was no departure from the Tribunal's direction of 17 March 2022 that the matter remained listed for hearing on 22 March 2022.

19. The claimant's several references to wishing to take the matter to the Crown Court is difficult to understand. The Crown Court has criminal jurisdiction. It has no jurisdiction to consider the claimant's complaints, which are brought under the Equality Act 2010. Complaints about discrimination in the workplace brought under the 2010 Act are within the exclusive jurisdiction of the Employment Tribunal (save for some exceptional causes of action where the Employment Tribunal and the civil courts have concurrent jurisdiction. These exceptional cases do not apply in this case).

20. On 7 February 2022 Employment Judge Lancaster, as I have said, directed there to be an open or public preliminary hearing to consider the strike out of the claimant's claims. In particular, the Tribunal's direction was to consider a strike out of the claim upon the following grounds:

    (a) That the claim has no reasonable prospect of success.

    (b) That the claimant has failed to comply with Orders of the Tribunal.

    (c) That the case was not being actively pursued by the claimant.

21. These are all grounds for the striking out of a claim or response (as the case may be) pursuant to Rules 37(1)(a), (c) and (d) respectively. By Rule 37(2) a claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing. On any view, the claimant has had reasonable opportunity to make representations as to why her claim should not be struck out upon any of the three relevant grounds. She was aware of today's hearing but chose not to attend. It was also open to her to make written representations showing cause why her case should not be struck out upon any of the grounds in question within the purview of Rule 37(1).

22. Before the hearing held on 22 March 2022, I spent some time going through the claim form and the other documentation submitted by the claimant. On the face of this material, I was satisfied that it cannot be said that the claimant's claims have no reasonable prospect of success. There appear to be arguable claims of direct discrimination related to disability, unfavourable treatment for something arising in consequence of disability, that the respondent failed to comply with the duty to make reasonable adjustments and harassment related to disability.

23. It is well established that once a claim has been properly identified, the power to strike it out under Rule 37(1)(a) will only rarely be exercised. In particular, cases should not as a general principle be struck out on this ground where the central facts are in dispute. This is particularly the case in discrimination cases which commonly turn on matters such as the mental processes of decision makers and inferences to be drawn from behaviour as well as the credibility of witnesses. This, coupled with the reversal of the burden of proof, makes discrimination cases particularly unsuitable for resolution summarily. Only in the clearest case should a discrimination or harassment claim be struck out. As was said in **Anyanwu v South Bank Students' Union** [2001] IRLR 305 HL, *"discrimination cases are generally fact sensitive, and their*

proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim of being examined on the merits or demerits of its particular facts is a matter of high public interest."

24. Accordingly, I declined to strike out the claimant's claim upon the basis that it has no reasonable prospect of success. While I appreciate that the respondent has a different view of matters, the merits of the claim can only be determined at a final hearing upon an examination of the evidence.

25. I then turn to a consideration of Rule 37(1)(c): that the Tribunal may strike out a case or response where there has been non-compliance with an Order of the Tribunal. On any view, the claimant has failed to comply with the Orders of Employment Judge Drake to which I referred above. There is no question that the claimant was aware of his Orders. As I say, they were emailed to her on 16 December 2021. She was given a second opportunity to comply by Employment Judge Lancaster on 7 February 2022. He directed that she comply with paragraphs 5, 6 and 7 of Employment Judge Drake's Order immediately. She failed to do so and continues not to comply.

26. It is of course a draconian sanction to strike out a claim or response (as the case may be) for non-compliance with the Tribunal's rules or Orders made by the Tribunal. The guiding consideration, when deciding whether to strike out for non-compliance with an Order, is the overriding objective to deal with cases fairly and justly. The Tribunal shall give effect to the overriding objective in interpreting or exercising powers given to it by the rules. The Tribunal must therefore consider the magnitude of the default in question, whether the default is the responsibility of any solicitor instructed by a party, the disruption, unfairness or prejudice caused and whether a fair hearing is possible. A failure to comply with Orders of a Tribunal over some period of time repeatedly may give rise to a view that if further indulgence is granted, the same will simply happen again. If the failure is simply an aberration and unlikely to reoccur then that weighs against strike out. The Tribunal must also have regard to the fact that each case should be dealt with in a way which is proportionate in order to ensure that other cases are not deprived of their own fair share of the resources of the court.

27. It was my judgment that there had been repeated failure by the claimant to comply with the Tribunal's Orders. The claimant's failure cannot simply be considered to be an aberration. On 7 February 2022 Employment Judge Lancaster made it quite clear what it was that the claimant needed to do and that the onus was upon her to act promptly. The claimant made no attempt to comply with Employment Judge Drake's Orders. There can be no other conclusion but that further indulgence is likely to result in repeated non-compliance.

28. It is not proportionate to allow this case to continue to use precious Tribunal resources. Two hearings have already taken place. The claimant attended neither. Simply adjourning for a third hearing would be to allocate to this case an unfair share of resources to the detriment of others.

29. I also take the view that a fair trial is simply not possible. The claimant complains of bullying and discrimination issues from March 2018 to March 2021. It stands to reason that memories will fade about events going so far

back in time. The respondent does not even yet know the case it has to answer both upon the merits of the claimant's claim and the issue of disability.

30. The third ground of striking out the claim is that to be found in Rule 37(1)(d): that the claim has not been actively pursued. This ground covers two issues. The first of these is what is known as intentional and contumelious default. That is to say, an intentional failure to pursue the case coupled with disdain for the judicial process. The second is where there is inordinate and inexcusable delay. In the second situation, it must be shown that there has been such a delay and that the delay will give rise to a substantial risk of injustice because it is not possible to have a fair trial of the issues in the action or is such as is likely to cause to have caused serious prejudice to the respondent.

31. I am satisfied that there has been intentional and contumelious default in this case. At the risk of repetition, the claimant has known full well what it is that she is required to do. She has simply failed to do it. The correspondence which she has sent to the Tribunal has shown disdain for the process. She has accused the Employment Tribunal of incompetence and commented in her email of 18 February 2022 that the Employment Tribunal was *"not at the level to deal with this case."* Such a remark is disdainful of this specialist jurisdiction and of the judiciary that works within it.

32. On any view, the claimant has failed to progress her case. She has not attended the two hearings held on 25 November 2021 and 22 March 2022. She chose to absent herself from both. Prior to the hearing on 22 March 2022 she applied for an adjournment without success. The Tribunal made it clear that the matter remained listed. The claimant decided to absent herself. It is for the Tribunal and not the parties to direct how cases should proceed. The Tribunal having informed the claimant that the matter remained listed it was for her to attend the hearing. It is not in a party's gift to cancel a hearing. Only the Tribunal has the power to adjourn.

33. There has also been an inordinate and inexcusable delay in progressing this matter. A fair hearing of this issues in the case has been jeopardised for the reasons which I gave when ordering the strike out under Rule 37(1)(c).

34. In her reconsideration application of 31 March 2022, the claimant contends that she gave the Tribunal *"adequate plus reasonable explanations in terms of why myself was cancelling the hearing. Myself told you that due to all the excessive issues that myself have been dealing with it should go to Crown Court."* As I have said, it is not for the claimant to decide whether to cancel a hearing. Only the Tribunal has the power to direct that a hearing should be vacated. Again, at the risk of repetition, the claimant's reference to the matter being referred to the Crown Court is misconceived.

35. Nothing else within the claimant's email of 31 March 2022 comes close to persuading me that there are any grounds upon which to reconsider my Judgment of 22 March 2022. I am satisfied therefore that it can be said that there is no reasonable prospect of the Judgment being varied or revoked. The ruling that I made that day was legally sound. It is not in the interests of justice for it to be varied or revoked. The claimant had her opportunity to prosecute the case and failed so to do. The interests of justice include a consideration of the interest of the respondent and the Tribunal. It is not in the interests of justice for a reconsideration hearing to be heard. It may be

apprehended that the claimant will fail to attend it. In any case, it can be said that there is no reasonable prospect of the claimant demonstrating any legal error in the Judgment which I made in striking out the claims upon the grounds in Rules 37(1)(c) and (d).

36. The claimant's reconsideration application is dismissed accordingly.

Employment Judge Brain

Date 26 April 2022